BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the District Court on the special motion (R. 300) is reported in 25 Fed. Supp., 560. The opinion in the Circuit Court of Appeals has not been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 6, 1941 (R. 432). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, (28 U. S. C. A., Section 240 (a); 43 Stat. 936).

STATEMENT

A concise statement of the proceedings, and of the questions involved has been made in the foregoing petition.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in affirming (R. 432) the final decree of the United States District Court for the District of Maine (R. 400, 401) granting the special motion filed by defendants on January 13, 1938 (R. 290, 293).

2. The Circuit Court of Appeals erred in affirming (R. 432) the final decree of the United States District Court for the District of Maine (R. 400, 401) in-so-far as the same struck and dismissed prayers (b) and (c) from the bill of complaint as last amended.

3. The Circuit Court of Appeals erred in affirming (R. 432) the final decree of the United States District Court for the District of Maine (R. 400, 401) in-so-far as it decreed that the amended bill of complaint be dismissed upon the payment into Court by the defendants of the amount the Court determined to be the plaintiff's share as a stockholder in the full amounts claimed to be due The Midwest Refining Company, a corporation, under prayers (d), (e), (f) and (g) of the amended bill of complaint on account of the matters and things set forth and alleged in said amended bill of complaint, with interest, and the payment into Court with interest of plaintiff's counsel fees, and expenses.

ARGUMENT

As disclosed by the foregoing petition, a suit by a minority stockholder against a dominant majority stockholder, brought in the right of the dominated corporation, to set aside a sale of all assets of the dominated corporation to the dominant stockholder and its controlled subsidiary and for an accounting, and seeking, in addition, the recovery of a large sum of money, alleged to be due by the dominant stockholder to the dominated corporation, has been terminated without a trial on the merits by striking on mo-

tion supported only by ex parte affidavits the prayers seeking to set aside the sale and for accounting and by decreeing that the dominant stockholder pay into court $1,246.22 as plaintiff's share, as a stockholder, in a recovery of $15,554,681.58 claimed, and for the purposes of the motion, admitted to be due by said dominant stockholder to the corporation under the remaining prayers, together with $40,800.00 as counsel fees and $2,346.27 as expenses, and that the suit be dismissed upon the payment of said sums into Court.

Aside from the arbitrary striking from the complaint of prayers (b) and (c), based upon allegations which admittedly stated a sufficient cause of action for the equitable relief therein prayed, the procedure sanctioned by the judgment of the Circuit Court of Appeals is a manifest departure from established legal principles and practice in minority stockholder suits.

In their brief in the Court of Appeals the attorneys for defendants "concede that the procedure adopted in this case is novel" and that they "have been unable to discover any recorded case in which a similar motion has been passed upon * *." The District Court characterizes the procedure as "somewhat unusual." (R. 308). The Circuit Court of Appeals frankly concedes that it is novel and quotes the special motion in the margin of its opinion "Because of its novelty." (R. 420). We respectfully submit that it is not only novel and unusual, but is a radical and dangerous departure from the established principles of law governing derivative suits by minority stockholders in the right of their corporations. It is radical because it converts a suit in the right of the corporation to re-

cover over fifteen million dollars due to it into a suit by the minority stockholder to recover in his own right a part thereof proportionate to his stock ownership. It is dangerous because it establishes a precedent by which a dominant majority stockholder, who has used his power of domination to the loss and detriment of the dominated corporation, can escape full responsibility to said corporation and to other stockholders by dealing only with each stockholder who takes action in behalf of the corporation. It permits such dominant stockholder to force the dismissal of every suit brought by a minority stockholder who has the temerity and the financial ability to seek redress in behalf of the corporation for wrongs perpetrated on it and for debts due it, upon payment to him of an amount equal to his proportion of the claimed recovery in behalf of the corporation, leaving the other stockholders, who are entitled to the benefit of a recovery in said suit, to incur the risk and expense of bringing another suit and the further risk of being held barred by laches if they do so. The procedure countenanced in this case makes it impossible for any small minority stockholder or stockholders to compel restitution to the corporation of the amount due to it, because it permits the dominant majority stockholder to end each such litigation by electing to pay only the share or shares of the plaintiff or plaintiffs in the claimed recovery.

It is too stringent a requirement that each minority stockholder, in order to obtain his share of what is due his corporation, must be willing and financially able to take on himself the heavy burden of such litigation.

Pacific Railroad of Missouri v. Missouri Pacific Railway Co., 111 U. S., 505; 28 L. Ed., 498, 504.

In protecting the dominant majority stockholder from the consequences of its own wrongs and resulting obligations the decree of the District Court and the judgment of the Court of Appeals disregards the important and established law that "The corporation is a person and its ownership is a conductor that makes it impossible to attribute an interest in its properties to its members."

Klein v. Board of Tax Supervisors, 282 U. S., 19; 51 S. Ct. 15, 16; 75 L. Ed., 140.

Donnell v. Herring-Hall Marvin Safe Company, 208 U. S., 267, 273; 52 L. Ed., 481, 487.

And in disregarding this essential characteristic of a corporation with the result that the dominant majority stockholder is shielded from the consequences of his own wrongs and resulting obligations, these Courts refuse to consider the fact that the corporation has, or may have, creditors entitled to look to the recovery for payment of debts due to them, and the further fact that the government is or may be entitled to income tax running into millions of dollars upon receipt, by the corporation, of the $15,554,681.58, conceded for the purposes of the special motion to be due to it. (R. 431,432).

To the argument that individual relief to the minority stockholder "might prejudice the rights of creditors" and hamper or defeat the right of the gov-

ernment to collect income taxes, the answer of the Court of Appeals was that it regarded this argument "as beside the point." In other words, according to the opinion and holding of this Court, it was of no consequence in deciding whether corporate entity should be disregarded that the claims of ordinary creditors of the corporation might be prejudiced or that the obligation to pay income tax to the government might be avoided.

To the contrary, the rights of creditors and the holders of claims against the corporation "are paramount and their claims should be first satisfied," and in order that their claims may be safe-guarded corporate entity should not be disregarded by permitting a minority stockholder to sue for and recover only his pro rata share of what is due the corporation.

Boatright v. Steinite Radio Corp., 46 Fed. (2d) 385, 388 (C. C. A. 10th Circ.)

Nor will corporate entity ever be disregarded when to do so will defeat or hamper the collection of taxes.

Burnet v. Com. Imp. Co., 287 U. S., 415; 53 S. Ct. 198; 77 L. Ed., 399.

Klein v. Board of Tax Sup'rs., 282 U. S., 19; 51 S. Ct., 15, 16; 75 L. Ed., 140.

Consumers Constr. Co. v. Comm. of Int. Rev., 94 Fed. (2d) 731, 734 (C. C. A. 1st Circ.

Old Colony Tr. Co. v. Comm. of Int. Rev., 69 Fed., (2d) 699, 701-2 (C. C. A. 1st Circ.)

The process of reasoning, by which the Court of Appeals arrives at its conclusion is that the minority stockholder in bringing suit acts in "a dual role," and seeks both to redress a wrong to the corporation and to himself as a stockholder therein. From the asserted right on the part of the minority stockholder "at his pleasure" to continue the prosecution of the suit or to compromise, abandon or discontinue it until some other stockholder intervenes, the Court of Appeals draws its conclusion that the trial Court, against the will of such stockholder, has the power "to decree a dismissal of the plaintiff's bill upon payment in full of all of his individual damages." (R. 431). Assuming the soundness of the premise, the conclusion is an obvious non-sequitur. The rule stated, and the authorities cited, give the minority stockholder the option of continuing the suit in the primary right of the corporation, if he sees fit to do so. It does not and should not give the wrong-doing dominant stockholder the option to convert a suit in the primary right of the corporation into a suit in the secondary right of the individual stockholder to the detriment of other stockholders who have not joined, but to whose benefit the recovery would enure, and to the detriment of creditors of the corporation for debts due to them, including the very large indebtedness that would or concededly may accrue to the government for income taxes on the amount recovered in consequence of the suit. To say that the majority stockholder has the right at his election to dispose of the suit in the right of the corporation upon the basis of declining to prosecute it further at his own expense and risk, is a very different thing from saying that he can be forced to

abandon the assertion of the primary right of the corporation, regardless of its effect on other stockholders and creditors.

A minority stockholder suing in the right of the corporation is a trustee, whose position in the suit is "the precise equivalent of the guardian ad litem."

Whitten v. Dabney, 171 Cal., 621; 154 Pac., 312, 316.

He does not bring such a suit because his rights have been violated, or because the cause of action is his, or because he is entitled to relief.

United Copper Securities Co. v. Amalgamated Copper Co., 244 U. S., 261, 263.

Dana v. Morgan, 232 Fed., 85 (C. C. A. 2nd Circ.) 3 Pomeroy's Eq. Juris. (4th Ed.) Sec. 1095, p. 2524-5.

Such a suit "can only be maintained on the ground that the rights of the corporation are involved. * * * The relief asked is on behalf of the corporation, not the individual stockholder; and if it be granted, the complainant derives only an incidental benefit from it."

City of Davenport v. Dows, 85 U. S. (18 Wall). 626; 21 L. Ed., 938.

Dickerman v. Northern Trust Co., 176 U. S., 181, 188; 44 L. Ed., 429; 20 S. Ct., 311.

Delaware & Hudson Company v. Albany and Susquehanna Railroad Company, 213 U. S., 435, 447.

The measure of relief that can be granted in a stockholder's suit for the benefit of the corporation is such only as could be granted to the corporation if it were complainant.

Collins v. Penn.-Wyoming Copper Co., 203 Fed., 726, 729.

"The suit, when brought by stockholders, is still a suit to enforce a right of the corporation and to recover a sum of money due to the corporation; and the corporation is a necessary party, in order that it may be bound by the judgment."

Porter v. Sabin, 149 U. S., 473, 478; 37 L. Ed., 815, 818.

It is only when the corporation could maintain the suit in its own right that a minority stockholder can maintain a derivative suit.

Gallagher v. Pacific American Co., 97 Fed. (2nd) 193 (C. C. A. 9th Circ.)

The controversy is between the corporation and the party whose acts are complained of, and the corporation is the beneficial plaintiff though joined as a party defendant.

City of Davenport v. Dows, 85 U. S., (18 Wall.) 626; 21 L. Ed., 938.

Sias v. Johnson, 86 Fed. (2d) 766 (C. C. A. 6th Circ.)

Arnstein v. Bethlehem Steel Corp, 18 Fed. Supp., 916 (D. C. E. D. N. Y.)

The value of the corporate rights involved, not the value of plaintiff's stock, determines the amount involved for jurisdictional purposes.

Hutchinson Box Board and Paper Co., v. Van Horn, 299 Fed., 424 (C. C. A. 8th Circ.)

Johnson v. Ingersoll, 63 Fed. (2d) 86 (C. C. A. 7th Circ.)

Any money judgment or final relief runs in favor of the corporation, not in favor of the minority stockholder.

Dana v. Morgan, 232 Fed. 85 (C. C. A. 2nd Circ.)

Wilhelm v. Consolidated Oil Corp., 84 Fed. (2d) 739, 748 (C. C. A. 10th Circ.)

Arnstein v. Bethlehem Steel Corp., 18 Fed. Supp., 916 (D. C. E. D. N. Y.)

Graham v. Dubuque Sp. Mach. Works, 138 Ia., 456, 114, N. W., 619, 621.

Harding v. American Glucose Co., 182 Ill., 551; 55 N. E. 577, 603.

3 Pomeroy's Eq. Juris. (4th Ed.) Sec. 1095, p. 2524-5.

And it is reversible error to enter judgment in favor of the complaining stockholder in proportion to his stock ownership.

United Copper Securities Co. v. Amalgamated Copper Co., 244 U. S., 261,263.

Wilhelm v. Consolidated Oil Corp., 84 Fed. (2d) 739, 748 (C. C. A. 10th Circ.)

Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill., 312; 67 N. E., 17.

In upholding the decree of the District Court disposing of plaintiff's suit as a minority stockholder of The Midwest Refining Company by dismissing his amended bill of complaint on payment into Court of a pro rata part of the claimed recovery on behalf of The Midwest Refining Company plus counsel fees and expenses, the Circuit Court of Appeals for the First Circuit disregarded the essential nature of the suit as a suit in the right of the corporation and, in effect, converted it into a suit by plaintiff in his individual right. This could only be done by disregarding the corporate entity of The Midwest Refining Company, for certainly it is the rule "most important in business and law," that a "corporation is a person and its ownership is a conductor that makes it impossible to attribute an interest in its property to its members."

The basis for disregarding corporate entity of The Midwest Refining Company which is asserted in the special motion is that the acceptance of liquidating dividends by all stockholders except those who had voted against the inequitable sale, the filing of valua-

tion proceedings by Norwin S. Bean, and the purchase pending suit of the stock of all other stockholders who had voted against such sale except that of plaintiff left only the plaintiff to benefit by the further prosecution of the suit, and that as his share was only a small part of the expense defendants would necessarily incur to defend the suit on its merits, it would be an unconscionable hardship for the court to continue the suit in the primary right of The Midwest Refining Company, when defendants were willing to pay plaintiff his pro rata share of any recovery to which said corporation was entitled with costs and counsel fees. As already pointed out in the foregoing petition, defendants offered no evidence whatsoever in regard to the expense to which they would be put in the further defense of the suit and the record affords no basis in fact for the contention that the defense of the suit on the merits would be unduly burdensome. No more is it made to appear that the plaintiff alone is entitled to the benefits of a recovery of the fifteen and a half million dollars recoverable in the right of the corporation, The Midwest Refining Company. In the event of recovery in the right of the corporation, all debts of the corporation including claims for income taxes would be payable therefrom, and such creditors have a prior claim to that of the plaintiff.

Boatright v. Steinite Radio Corp., 46 Fed. (2d) 385, 388 (C. C. A. 10th Circ.)

Furthermore, if it be assumed, without allegation or proof, that there were no such creditors and that receipt by The Midwest Refining Company of the fifteen and a half million dollars alleged to be due to it

would create no liability for income tax, it is still not true that the plaintiff alone is interested in and entitled to participate in the recovery of this fifteen and a half million dallars.

It appears from the motion itself (R. 290-293) that there are fourteen stockholders owning 122 shares not represented or voting at the meeting at which the offer of Standard Oil Company to purchase all assets of The Midwest Refining Company was accepted; and from the amended complaint (R. 262) that there are two stockholders, owning 17 shares who voted for the sale, beside the eight directors each with a nominal ownership of one share.

If Standard Oil Company owes The Midwest Refining Company over ten million dollars in interest and on account of the other wrongs alleged to have been perpetrated by it, these stockholders are certainly entitled to their share of it. A fortiori, if Standard Oil Company owes The Midwest Refining Company over five million dollars, on account of the agreed purchase price, these stockholders have done nothing to forfeit their share in it. They are still stockholders of The Midwest Refining Company and as such are entitled to share in any moneys due it. Regardless of whether or not the minority stockholders accepted their liquidating dividends, they still have a stockholder's interest in the assets of the corporation and, therefore, an indirect interest in any amounts still due to it.

Those stockholders who received their liquidating dividends by thus accepting part only of what was due them did not forfeit their share in the additional $15,-

554,681.58 stipulated for the purposes of the special motion to be due by Standard Oil Company to The Midwest Refining Company. They did not forfeit their rights by not accepting May's invitation to join in the suit. The suit was for the benefit of the corporation and incidentally for the benefit of all stockholders, regardless of whether they intervened therein, and it was accordingly not essential to their rights to share in the fruits of a recovery that they first intervene in said suit.

Southern Pacific Co. v. Bogert, 250 U. S., 483, 489-90; 63 L. Ed., 1099.

Klein v. Board of Tax Sup'rs., 282 U. S. 19; 51 S. Ct., 15, 16; 75 L. Ed., 140.

Donnell v. Herring-Hall Marvin Safe Co., 208 U. S., 267, 273; 52 L. Ed., 481, 487.

But if plaintiff were the only stockholder entitled to insist that Standard Oil Company pay its indebtedness to The Midwest Refining Company there would be no case for disregarding its corporate existence. It is only in exceptional cases that corporate entity will be disregarded where to do so will prevent a circumvention of public policy, or prevent a fraud, or when one corporation is in fact nothing but the agency of another.

Consumers Construction Co. v. Commr., of Int. Rev., 94 Fed. (2d) 731, 734 (C. C. A. 1st Circ.)

Gillis v. Jenkins Petroleum Process Co., 84 Fed. (2d) 74 (C. C. A. 9th Circ.)

Burnet v. Commonwealth Imp. Co., 287 U. S., 415; 53 S. Ct., 198; 77 L. Ed., 399.

Old Colony Trust Co. v. Comm. of Int. Rev., 69 Fed. (2d) 699, 702 (C. C. A. 1st Circ.)

Majestic Co. v. Orpheum Circuit Inc., 21 Fed. (2d) 720, 724 (C. C. A. 8th Circ.)

Ulmer et al. v. Lime Rock R. R. Co., 98 Me., 579; 57 Atl., 1001.

Corporate entity will never be disregarded to further, or to protect against a fraud or other wrong, or to shield a majority stockholder from paying in full what he owes the corporation.

In re Collins, 75 Fed. (2d) 62, 64 (C. C. A. 8th Circ.)
Boatright v. Steinite Radio Corp., 46 Fed. (2d) 385, 386 (C. C. A. 10th Circ.)

The amended complaint seeks relief in the right of The Midwest Refining Company from conduct of its dominant majority stockholder which constituted an actual, intentional fraud on The Midwest Refining Company. Corporate entity should not be disregarded to shield such a wrong doer from the consequences of his own wrong.

But if the complaint had sought relief from conduct of the dominant majority stockholder which entitled The Midwest Refining Company to "relief by the application of equitable principles" as held by the lower court (R. 305) and, by the Court of Appeals (R. 428) the Court should not have disregarded the

corporate entity of The Midwest Refining Company to permit Standard Oil Company to escape in large measure the consequences of such inequitable conduct.

Nor should corporate entity be disregarded so as to deny The Midwest Refining Company the right to recover over five million dollars of the purchase price which Standard Oil Company agreed to pay but did not pay The Midwest Refining Company for its assets, according to the allegations of the amended bill.

The effort of the corporation, acting through a minority stockholder, to collect a large indebtedness due to it by a majority stockholder presents no such unusual condition as would justify the disregard of corporate entity, unless it can properly be said that such exceptional condition is created by the fact that the majority stockholder owns all but a small percentage of the outstanding stock. Such basis for disregarding the corporate entity of The Midwest Refining Company is expressly disclaimed by the Circuit Court of Appeals (R. 428) and it is well settled that corporate entity will not be disregarded either at law or in equity simply because the stock is owned by one or by a few rather than by many stockholders.

Burnet v. Commonwealth Imp. Co., 287 U. S., 415; 53 S. Ct., 198; 77 L. Ed., 399.

Old Colony Trust Co. v. Comm. of Int. Rev., 69 Fed. (2d) 699, 702 (C. C. A. 1st Circ.)

Majestic Co. v. Orpheum Circuit, Inc., 21 Fed. (2d) 720, 724 (C. C. A. 8th Circ.) and cases cited.

Ulmer et al. v. Lime Rock R. R. Co., 98 Me., 579; 57 Atl., 1001.

Nor does the acquisition of a large majority of the stock confer on such majority stockholder any equity to disregard corporate entity and thereby escape, in whole or in part, his obligation to the corporation arising out of his breach of trust as dominant stockholder, or arising out of his contract with the corporation.

Moore v. Los Lugos Gold Mines Co., 172 Wash., 570; 21 Pac. (2d) 253.

Theis v. Spokane Falls Gas Light Co., 34 Wash., 23; 74 Pac., 1004.

In re Paine, 200 Mich., 58; 166 N. W., 1036.

In re Doe Run Lead Co., 283 Mo., 646; 223 S. W., 600.

Thomas H. Mason v. Pewabic Mining Co., 133 U. S., 50; 33 L. Ed., 524.

Cox v. Stokes, 156 N. Y., 491; 51 N. E., 316, 323.

To establish such a rule would place the small minority stockholder at the mercy of the dominant majority.

In re Doe Run Lead Co., 283 Mo., 646; 223 S. W., 600.

Theis v. Spokane Falls Gas Light Co., 34 Wash., 23; 74 Pac., 1004.

In re Paine, 200 Mich., 58; 166 N. W., 1036.

Kavanaugh v. Kavanaugh Knitting Co., Inc., 226 N. Y., 185; 123 N. E., 148, 152.

Ervin v. Oregon Ry. & Nav. Co., 20 Fed., 577; 27 Fed., 625 (C. C. S. D. N. Y.)

MacArthur et al. v. Port of Havana Docks Company, et al., 247 Fed., 984 (D. C. D. Maine, S.D.)

Allied Chemical & Dye Corp. v. Steel & Tube Co., of Amer., 14 Del. Ch 1; 120 Atl., 486, 491-2.

The special motion of defendants, based upon which the lower court dismissed the amended complaint, conceded the right of The Midwest Refining Company to recover from Standard Oil Company for the several wrongs alleged to have been perpetrated on it, and for unpaid purchase price, an amount aggregating $15,554,681.58, according to stipulation (R. 389-90). It was error to dismiss the amended bill on payment of $1246.22 into Court for plaintiff and the further payment of his counsel fees and expenses.

Both the District Court (R. 305) and the Circuit Court of Appeals (R. 427) denied the right to strike prayers (b) and (c) upon the theory asserted by defendants in their special motion, viz., that plaintiff by not filing a written dissent from the sale must be deemed to have assented to it, and so can have no relief in equity against such sale (R. 292), and in so doing were supported by abundant authority.

MacArthur et al. v. Port of Havana Docks Company, et al., 247 Fed., 984 (D. C. D. Maine, S. D.)

Mason v. Carrothers, 105 Me., 392; 74 Atl., 1030.

Eagleson v. Pacific Timber Co., 270 Fed., 1008, 1010 (D. C. Del.)

Allied Chemical and Dye Corp. v. Steel & Tube Co., of Amer., 14 Del. Ch. 1; 120 Atl., 486.

Kavanaugh v. Kavanaugh Knitting Co., Inc., 226 N. Y. 185, 123 N. E., 148.

Theis v. Spokane Falls Gas Light Co., 34 Wash. 23; 74 Pac., 1004.

In re Paine 200 Mich. 58; 166 N. W., 1036.

In re Doe Run Lead Co. 283 Mo., 646; 223 S. W., 606, 609.

Both Courts agreed (R. 305 and R. 427) that the amended bill stated a case for equitable relief under said prayers, but concurred in striking out and dismissing them upon the assumption that the court was justified in exercising its power "to withhold its equitable relief of rescission, even though a case for such relief is made out, when it appears that to grant such relief would impose a burden upon defendant wholly out of proportion to the benefit which that relief would confer upon the plaintiff." (R. 428). Both assumed that the allegations of the bill as amended no longer showed a sale by a dominant majority stockholder to himself upon an inadequate consideration.

As to the first assumption there was no evidence offered by defendants to support the allegations of hardship which are averred in the special motion, the

ex parte affidavits, which alone were offered in support of said motion, being entirely silent on the subject. The second assumption is contradicted by the allegations of the amended bill. While the amendment did withdraw the general allegation that the sale of "lands, leases and concessions" of producing and non-producing acreage (R. 15) and certain other property including patents, copyrights, franchises, contracts and good will (R. 16) was for greatly less than their true value, it retained the specific allegation that the consideration was inadequate at least to the extent of millions of dollars of interest which Standard Oil Company owed, but for which it did not agree to pay anything (R. 266, Par. XII). This allegation brings the case made by the amended bill squarely within the rule that where a sale is made by a dominant stockholder to himself "inadequacy of price is unfairness, and condemned without further inquiry in an attempt to determine whether due to corruption or honest, but mistaken, judgment unconsciously swayed by adverse interest. There is no safety otherwise."

Geddes v. Anaconda Copper Mining Company, 222 Fed., 129, 133; 254 U. S., 590, 600, 602.

As dominating stockholder Standard Oil Company was in the position of a trustee for The Midwest Refining Company and for the minority stockholders.

Pepper v. Litton, 308 U. S., 295, 306; 60 S. Ct., 238, 245.

Southern Pacific Co. v. Bogert, 250 U. S., 483; 63 L. Ed., 1099.

MacArthur et al. v. Port of Havana Docks Company, et al., 247 Fed., 984 (D. C. D. Maine, S. D.)

Hyams v. Calumet & Hecla Mining Co., 221 Fed., 529, 537 (C. C. A. 6th Circ.)

Alaska Juneau Gold Mining Co. v. Ebner Gold Mining Co., 239 Fed., 638, 643 (C. C. A. 9th Circ.)

Wheeler v. Abilene National Bank Bldg. Co., 159 Fed., 391, 393 (C. C. A. 8th Circ.)

Stebbins v. Michigan Wheelbarrow and Truck Co., 212 Fed., 19, 28 (C. C. A. 6th Circ.)

Sidell v. Missouri Pacific Ry. Co., 78 Fed., 724, (C. C. A. 2nd Circ.)

Blanstein v. Pan American Pet. & Tr. Co., 21 N. Y. S. (2d) 651, 712-3.

According to the allegations of the bill this dominant stockholder sold to itself and its controlled subsidiary all of the assets of The Midwest Refining Company, a going and prosperous corporation, for the purpose of acquiring its assets and business for itself free of the minority stockholders, without any effort whatsoever to find any other purchaser and by private sale at which no other purchaser was given the opporunity to bid. It could not thus use its power for its "personal advantage and to the detriment of the stockholders" no matter how meticulous it may have been "to satisfy technical requirements."

Pepper v. Litton, 308 U. S., 295, 311; 60 S. Ct., 238, 247.

And this is true though the sale were made strictly according to the terms of a statute authorizing a sale of all assets of the corporation on the vote of a majority of the stockholders or directors.

MacArthur et al. v. Port of Havana Docks Company, et al., 247 Fed., 984 (D. C. D. Maine, S. D.)

Theis v. Spokane Falls Gaslight Co., 34 Wash., 23; 74 Pac., 1004.

In re Paine, 200 Mich., 58; 166 N. W., 1036.

In re Doe Run Lead Co., 283 Mo., 646; 223 S. W., 600, 609.

Kavanaugh v. Kavanaugh Knitting Co., Inc., 226 N. Y., 185; 123 N. E., 148, 152.

Ervin v. Oregon Ry. and Nav. Co., 20 Fed., 577; 27 Fed., 625 (C. C. S. D. N. Y.)

Allied Chemical & Dye Corp. v. Steel & Tube Co. of Amer., 14 Del. Ch. 1; 120 Atl., 486, 491-2.

While the minority stockholders under such statutes take the risk of a sale to a third party in good faith, they should not be compelled to take the risk of loss from the cupidity of a fiduciary selling to himself, or the risk of being able to prove actual fraud or inadequacy of consideration at enormous expense to themselves.

Geddes v. Anaconda Copper Min. Co., 222 Fed., 129; 254 U. S., 590, 600-2.

Pearson v. The Railroad, 62 N. H., 537, 540.

Story's Eq. Juris., Sec. 322.

Nor should they be compelled to take the risk of loss from a sale where no effort whatsoever is made to find a purchaser other than the dominant stockholder, but all possible competition is stifled by a private sale to the dominant stockholder at a price fixed by it.

Sidell v. Missouri Pac. Ry. Co., 78 Fed., 724 (C. C. A. 2nd Circ.).

Hyams v. Calumet and Hecla Min. Co., 221 Fed. 529, 542 (C. C. A. 6th Circ.).

The power of such a fiduciary "is at all times subject to the equitable limitations that it may not be exercised for the aggrandisement, preference or advantage of the fiduciary to the exclusion or detriment of the cestuis. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation."

Pepper v. Litton, 308 U. S. 295, 311; 60 S. Ct., 238, 247.

Not only are the dealings of such dominant stockholders subject to "rigorous scrutiny" but "where any of their contracts or engagements with the corporation is challenged the burden is on the * * stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the view point of the corporation and those interested therein * *. The essence of the test is whether or not under the circumstances the transaction carries the earmarks of an

arm's length bargain. If it does not, equity will set it aside."

Pepper v. Litton, 308 U. S., 295, 306; 60 S. Ct., 238, 245.

Geddes v. Anaconda Copper Mining Company, 254 U. S., 590, 599; 41 S. Ct., 209, 212; 65 L. Ed. 425.

The complaint as amended according to the express holding of both the District Court and the Circuit Court of Appeals is "sufficient in allegation at least to support a charge of unfair treatment and to entitle the plaintiff to 'relief by the application of equitable principles'." (R. 305, 428).

Defendants in their special motion make no attempt to meet the burden of showing either good faith or the inherent fairness of the sale from the view point of the corporation and the minority stockholders and from the allegations of the amended complaint it definitely appears that the sale, absolutely dominated as it was by the majority stockholder Standard Oil Company, carried none of "the earmarks of an arm's length bargain."

As a consequence of the natural advantage held by a dominant majority stockholder numerous strategies have been successfully devised to prevent the prosecution of minority stockholders suits to a conclusion on the merits. For this reason, the remedy provided by such suits has never been entirely effective or adequate.

41 Columbia Law Review, 405, 421, 422.

The present decision goes beyond all others and practically takes away the remedy of small minority stockholders seeking to redress wrongs to their corporations by permitting the dominant stockholder, who has perpetrated such wrongs, at its election, to force a dismissal of the suit upon the payment of a pro rata part of what the corporation is entitled to recover with the result that the dominant stockholder being caught is forced "to disgorge part of his (its) profits" but "is still financially better off than if he (it) had remained honest."

41 Columbia Law Review, 405, 427.

Respectfully submitted,

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